UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS *et al.*,

Plaintiffs,

v.

DONALD L. EVANS, Secretary of Commerce, *et al.*,

Defendants.

Civil Action No. 00-2799 (CKK)

MEMORANDUM ORDER
(April 30, 2002)

Presently before the Court is a Joint Motion for Entry of Consent Order [#70] that has been opposed by a group of Amici representing a commercial fishermen association and three conservation groups. Originally, the Amici had requested intervenor-defendant status. However, on March 24, 2002, this Court denied the motion for intervention, but considered the Amici's already-filed opposition to the consent decree to be an amicus brief. *National Ass'n of Home Builders v. Evans*, No. 00-2799 (D.D.C. Mar. 24, 2002) (memorandum order denying intervention). The Court then ordered Plaintiffs and Defendants to file a joint reply brief to Sections I & III of Amici's opposition to the proposed consent decree. *Id.* Unbeknownst to the Court, on March 20, 2002, Plaintiffs filed an objection to Amici's opposition to the proposed consent decree.[1] In response to Plaintiffs' submitting their own objections, Defendants filed an independent response indicating that "they adopt the plaintiff's main legal arguments that

[1] The Court is not sure as to the reason for the delay in receiving Plaintiffs' response. However, the Court did not receive and review Plaintiffs' filing until after the March 24, 2002, Order was issued.

respond to the objections to the consent decree raised by the Amici." Defs.' Response at 1. Defendants also requested expedited consideration of the proposed consent decree due to pending litigation in the Eastern District of California.

The Court has done its best, therefore, to review the proposed consent order in a judicious and prompt manner. Upon consideration of the proposed consent decree, Amici's brief in opposition to the proposed consent decree, Plaintiffs' response, Defendants' response, Amici's reply, the entire record before it, and the Tenth Circuit's recent decision in *New Mexico Cattle Growers Ass'n v. United States Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), the Court adopts the proposed consent decree. As the proposed consent decree includes Plaintiffs voluntarily dismissing without prejudice all counts of the lawsuit against Defendants pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the Court shall administratively close this case. This does not imply that the Court does not recognize its continuing jurisdiction over the substance of the proposed consent decree or that this Court would not be the situs of any attorneys' fees dispute, it merely serves to close the case for administrative purposes since all claims in the action have been voluntarily dismissed without prejudice.

The proposed consent decree contains a number of provisions worth mentioning. First, the critical habitat regulations that are at the center of this lawsuit are vacated and remanded to NMFS for new rulemaking. *National Ass'n of Home Builders v. Evans*, Civ. No. 00-2799 (D.D.C. March 8, 2002) (proposed consent decree) ¶ 1 ("The critical habitat regulations for salmon and steelhead adopted by the United States on February 16, 2000, 50 C.F.R. § 226.212 . . . are hereby vacated and remanded to NMFS for new rulemaking consistent with all applicable federal laws."). Second, as a result of the agency having vacated and remanded the rule, Plaintiffs have agreed to dismiss without prejudice all counts of the action against Defendants

pursuant to Federal Rule of Civil Procedure 41(a). *Id.* ¶¶ 2-3. Plaintiffs intend to seek attorneys' fees from Defendants and Defendants have agreed that Plaintiffs are entitled to an award of reasonable attorneys' fees and costs.

Amici's main challenge to the proposed consent decree is that:

> [Amici] ha[ve] made the straightforward and unrebutted point that the Court is not bound to accept – and should not accept – at face value an agency's agreement to vacate its own rule, even if the agency confesses error (which the defendants have not done here . . .). The Court must exercise its independent judgment regarding the proposed course of action and the rule to be set aside in order to ensure that the procedural and substantive rights of those with an interest in, and who may be protected by, the rule are not undercut for political or other reasons, as opposed to sound legal reasons.

Amici's Reply at 4-5. As a general proposition, the Court does not disagree with this statement. The Court does have a duty to make an independent judgment regarding approval of the proposed consent decree. "[T]he function of the reviewing court is not to substitute its judgment for that of the parties to the decree but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy." *United States v. Hooker Chemicals and Plastics Corporation*, 540 F. Supp. 1067, 1072 (W.D.N.Y.1982). "The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties." *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir.1980) (cited with approval in *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983)). This is not to say that the Court should generally "rubber stamp" proposed consent decrees. The consent decree, itself, must be considered "a judicial act" that is committed to the informed discretion of the trial court.

See Citizens for a Better Environment, 718 F.2d at 1124 (quoting *United States v. Swift & Co.*, 286 U.S. 106 (1932)).

In this case the Court has reviewed the consent decree and the recent law from the Tenth Circuit that prompted the Government to agree to vacate the rule. *See National Ass'n of Home Builders v. Evans*, Civ. No. 00-2799, at 2 (D.D.C. March 8, 2002) (proposed consent decree) ("WHEREAS, the approach to economic analysis used by NMFS when promulgating 50 C.F.R. § 226.212 is similar to the approach ruled to be insufficient by the court in *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service*, 248 F.3d 1277"). It bears pointing out that the Court finds the decision in *New Mexico Cattle Growers* to be persuasive. In agreeing with the Tenth Circuit, the Court realizes it is disagreeing with a trial judge from this District. *See Trinity County Concerned Citizens v. Babbitt*, Civ. No. 92-1194, 1993 WL 650393, at *4 (D.D.C. Sept. 20, 1993). In *Trinity County*, Judge Norma Holloway Johnson wrote that consideration of economic costs, that might have already been incurred as a result of the listing of a species, was improper in making the critical habitat designation. *Id.* While the Court respects Judge Johnson's opinion, it is not bound by it because District Court decisions do not establish binding precedent. *In re Executive Office of President*, 215 F. 3d 20, 24 (D.C. Cir. 2000) ("District Court decisions do not establish the law of the circuit, nor, indeed, do they even establish the law of the district.") (internal citations and quotation marks omitted).

From this Court's perspective the Tenth Circuit's opinion is well-reasoned and comports with the express statutory language of Congress, which specifically requires that an analysis of the economic impact of a critical habitat designation be undertaken. Under the current "incremental baseline approach," any costs associated with listing the species is kept below the "baseline." While it is true that the statute commands that no economic costs are to be

considered at the listing stage, it does require an economic assessment at the critical habitat stage. The problem with the agency's approach is that in placing the economic impact of the listing (and other relevant factors) below the baseline, as the Court reads it, costs that should be considered in making the critical habitat designation are left entirely out of the picture. The Court simply disagrees with Amici's narrow construction of what "economic impact" the agency should consider in designating a critical habitat. Clearly, there is a problem with the current process underlying the critical habitat designation process. While the Court will leave it to the agency's wisdom and institutional knowledge to remedy the problem, vacating the rule and remanding it to the agency is clearly in order.

In making this determination, the Court is satisfied that the proposed consent decree comprises a fair and equitable resolution of the issues raised by this suit. The suit was premised on whether certain critical habitat designations were improperly made due to a flawed process. The Government, based on its view of the Tenth Circuit's decision in *New Mexico Cattle Growers*, has agreed to withdraw the critical habitat designation. Presumably, when the agency conducts new rulemaking it will be in accord with the procedures it views to be in accordance with the law. The Court is satisfied that this result is in the public interest.

Amici recognize the fact that the Court, through "an independent investigation . . . sufficient to determine that there are proper legal grounds for setting aside and remanding the rule" may vacate a rule. Amici Reply at 3. The Court notes that in approving the consent decree the Court needs to "assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy." *Hooker Chemicals*, 540 F. Supp. at 1072. Moreover, it is well recognized that adopting a consent decree is a "judicial act." *Citizens for a Better Environment*, 718 F.2d at 1124. Thus, given the Court's continuing oversight of the

consent decree and given the need of the Court to make an independent determination that the consent decree is in the public interest, the Court finds that vacating the rule at issue in this case is permissible. As explained *supra*, the persuasive rationale underlying the Tenth Circuit's opinion makes it quite understandable why the agency would want to remove the critical habitat designations and conduct them in accord with proper methodology. Thus, the Court does not find that the typical notice and comment requirements of 5 U.S.C. § 553 apply in this context, where the Court is approving a consent decree that vacates a rule.

As the Court determines that there are persuasive reasons for vacating the critical habitat designations at issue in this case, the Court does not need to reach Amici's other request that the rule be left intact pending further rulemaking.[2]

For the reasons stated *supra*, it is, this 30 of April, 2002, hereby

ORDERED that the Joint Motion by Plaintiffs and Defendants for entry of the consent order [#70] is GRANTED; it is further

ORDERED that this case be administratively closed following entry of the consent decree.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge

[2] The Court wishes to point out that even though the critical habitat designations are vacated by the consent decree, the ESA listings of salmon and steelhead still remain in place along with the panoply of regulatory protections attendant to their listed status.

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